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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JAMES ARTHUR WIRTH, Defendant and Appellant.	C042638 (Super. Ct. No. 02F00860)

A jury found defendant James Arthur Wirth guilty of five counts of attempted murder of peace officers by use of a deadly weapon (Pen. Code, §§ 664/187, 664, subd. (e), 12022, subd. (b)(1) -- counts one through five),[1] five counts of assaulting a peace officer with a deadly weapon and by force likely to produce great bodily injury (§ 245, subd. (c) -- counts six through ten), arson of an inhabited structure with use of an accelerant (§§ 451, subd. (b), 451.1, subd. (a)(5) -- count eleven), two counts of arson of property (§ 451,

[1] All further statutory references are to the Penal Code unless otherwise indicated.

subd. (d) -- counts twelve and thirteen), and stalking (§ 646.9, subd. (a) -- count fourteen). The jury found that the attempted murders were not premeditated. (§ 664, subd. (a).) Defendant was sentenced to two consecutive life terms.[2]

On appeal, defendant contends that four of the five attempted murder convictions must be reversed because the trial court gave deficient instructions. We disagree and shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant and Jill Wirth were married in 1987 and lived on Snowbird Way. Defendant and Jill had a physical fight, after which Jill took guns and ammunition away from defendant. In December 2001 Jill moved to Folsom and filed for divorce. Defendant changed the locks on the house.

In January 2002 defendant took an overdose of pills and was involuntarily hospitalized.[3] Defendant called Jill and tried to leave the hospital. After the police pulled him out of Jill's car and were attempting to handcuff him, defendant warned them there would be "a lot more unhappy families around." Defendant continued to taunt the police, offering to take them all on.

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[2] The trial court imposed consecutive life terms on counts one and two and concurrent life terms on counts three, four, and five. Determinate terms on counts eleven, twelve, and thirteen were also concurrent. Sentence was stayed on the assault charges (counts six through ten) under section 654.

[3] The prosecution presented records showing defendant was diagnosed with major depression and alcohol abuse.

On January 25, 2002, Jill discovered defendant outside her apartment. Later that evening, in a series of telephone calls, defendant told Jill she would find out something the next day, something was going to happen, and that he was taking the dogs. She also heard what sounded like a gunshot. Jill's car was found burning at 3:20 a.m. Jill told the police dispatcher defendant had been calling, saying he wanted to kill himself and would "torch" her residence.

About 5:00 a.m. on January 26, 2002, defendant called his son's former girlfriend. He told her he been drinking and taking pills. He said he moved Jill's car and burned it so she would be left with nothing. Defendant said he had bolted the doors to his house and had five gallons of gasoline in the house.

Later that morning, defendant told Jill he had doused things with gasoline and would take the dogs with him. He was waiting for someone to show up before lighting the match.

Defendant's friend Refugio Sanchez came to defendant's home. Defendant told Sanchez he was going to burn down the house. While Sanchez was there, defendant told Jill in a telephone call that gasoline had been spilled. When the police arrived, Sanchez saw defendant talk to them; defendant did not seem surprised to see them. Defendant had Sanchez listen to his wedding vows on tape. Defendant then asked Sanchez to take the dogs.

Defendant's stepson called the police after discussing it with Jill.

Sacramento County Sheriff's Deputies Glen Petree and Robert Pomerson went to the house and rang the doorbell and knocked on the door after seeing Sanchez and defendant inside. Defendant opened the miniblinds on the window next to the door and said, "What the fuck do you want[?]" Petree asked defendant to open the door. When defendant did not respond, Petree called for backup. Meanwhile, the deputies heard a power tool.

Sanchez stepped outside and told the deputies defendant had screwed shut all the doors. Defendant had explained to Sanchez he would burn the house while he lay in the bedroom. Sanchez said defendant showed him how he had arranged things in the master bedroom. There were gas cans in another bedroom, and knee-deep clothes in the hall where defendant intended to start the fire.

Deputy Rick Kemp arrived with a police dog, and a police helicopter circled overhead. Deputies Brendon Hom, Wayne Stephens, Kemp, Petree, and Pomerson prepared to force entry into the house, and two of them kicked open the door leading into the garage. They then kicked open the door between the garage and family room, calling defendant's name and yelling that they were from the sheriff's department. The deputies heard no sound other than their own voices and the barking dog.

The deputies saw gas cans in the family room and "debris" piled in the hallway. As the deputies entered the hall, a ball of flame came out of the bedroom and into the hallway. Deputies found defendant sitting in the shower with the water running.

Defendant told Deputy Hom that if "'you guys hadn't showed up, none of this would have happened. I was just gonna leave with my dogs.'"

Defendant told Sacramento Metropolitan Fire District Investigator Thomas McKinnon he had seen a police officer at the door, but he thought the dog barking was his dog. He did not hear the deputies knocking on the doors. Defendant lit the fire in his bedroom. He intended to burn up all of his wife's belongings. Defendant was "pretty sure" the deputies were coming in. Defendant admitted torching the car.

DISCUSSION

I

Defendant argues that the failure to instruct sua sponte that he must actually have known of all the victims in a "'particular zone of risk'" permitted the jury to convict him under a theory of "'transferred intent'" or "'implied malice.'" Hence, defendant concludes four of his five attempted murder convictions must be reversed.

Specifically, defendant argues the trial court failed to give an instruction derived from *People v. Bland* (2002) 28 Cal.4th 313 (*Bland*). Bland was decided on July 1, 2002, the first day of defendant's trial. Our Supreme Court held that the doctrine of "transferred intent" does not apply to attempted murder and that a defendant must specifically intend to kill each charged victim. This intent, however, may be concurrent as to all victims when a defendant creates a "kill zone" based upon the mode of attack. (*Id.* at pp. 330-331.)

In 2003, following *Bland* (and after defendant's trial), CALJIC No. 8.66.1 was adopted.[4] Defendant contends a similar instruction on concurrent intent should have been given sua sponte. Failure to do so, defendant argues, was an "erroneous insertion" of the prohibited doctrine of transferred intent into an attempted murder case. CALJIC No. 8.66.1 would have avoided this problem, he argues, because it would have told the jury it had to find defendant *concurrently* intended to kill other persons before being found guilty of attempted murder as to those persons.

We disagree.

First, it can hardly be said that the trial court erred by failing sua sponte to give a CALJIC instruction that had not yet been drafted. In order for the trial court to be required to give an instruction sua sponte, it must be part of a general principle of law. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) The idea that an instruction is required for "concurrent intent" was rejected in *Bland*:

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[4] CALJIC No. 8.66.1 provides: "A person who primarily intends to kill one person, may also concurrently intend to kill other persons within a particular zone of risk. This zone of risk is termed the 'kill zone.' The intent is concurrent when the nature and scope of the attack, while directed at a primary victim, are such that it is reasonable to infer the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity. [¶] Whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a 'kill zone' is an issue to be decided by you." (At this writing, no published or unpublished case has cited this instruction.)

"This concurrent intent theory is not a legal doctrine requiring special jury instructions, as is the doctrine of transferred intent. Rather, it is simply a reasonable inference the jury may draw in a given case: a primary intent to kill a specific target does not rule out a concurrent intent to kill others." (*Bland*, *supra*, 28 Cal.4th at p. 331, fn. 6.)

Second, unlike the situation in *Bland*, the jury was not instructed with a "transferred intent" standard, which could possibly lead to a lesser mens rea for attempted murder than specific intent to kill another human being. To the contrary, this jury was instructed with the full panoply of specific intent instructions. (CALJIC Nos. 8.66 (modified), 3.31 (modified).) As defendant acknowledges, these modified instructions stated defendant must have had a specific intent to kill another human being.

Third, defendant misunderstands the law. Defendant must have intended to kill those victims within an area. Defendant did not have to have been aware of the *identity* of each potential victim. In *Bland*, the Supreme Court relied upon *People v. Vang* (2001) 87 Cal.App.4th 554, 563-565 (*Vang*). In *Vang*, "the defendants shot at two occupied houses. The Court of Appeal affirmed attempted murder charges as to everyone in both houses -- 11 counts -- even though the defendants may have targeted only one person at each house. 'The jury drew a reasonable inference, in light of the placement of the shots, the number of shots, and the use of high-powered, wall-piercing weapons, that defendants harbored a specific intent to kill

every living being within the residences they shot up. . . . The fact they could not see all of their victims did not somehow negate their express malice or intent to kill as to those victims who were present and in harm's way, but fortuitously were not killed.' ([*Vang*, *supra*, 87 Cal.App.4th] at pp. 563-564; see also *People v. Gaither* (1959) 173 Cal.App.2d 662, 666-667 [343 P.2d 799] [defendant mailed poisoned candy to his wife; convictions for administering poison with intent to kill affirmed as to others who lived at the residence even if not a primary target].)" (*Bland*, *supra*, 28 Cal.4th at p. 330.)

Here, defendant obviously intended to kill anyone who entered the hallway. Defendant was aware there were police officers at the door although he said in his admission he only saw one. Defendant lit the gasoline from inside his bedroom when the deputies were in the house. It is immaterial whether defendant could see the number of potential victims at the time he took his action.

Finally, it cannot be said that any failure to expand the instructions was prejudicial under any analysis.

"Nonetheless, not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation. The question is '"whether the ailing instruction . . . so infected the entire trial that the resulting conviction violates due process."' [Citation.] '"[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge."' [Citation.] If the charge as a whole is ambiguous,

the question is whether there is a '"reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.' [Citation.]" (*Middleton v. McNeil* (2004) ___ U.S. ___ [124 S.Ct. 1830, 1832, 158 L.Ed.2d 701].)

Sanchez testified defendant was talking to Jill on the telephone. Jill told defendant she had called the police. The sheriff's deputies testified they all yelled. The helicopter was circling the house. There is no doubt the clothing- and gasoline-filled hallway was intended to be a killing zone. Defendant had shown his set-up to Sanchez. Defendant doused the hall with as much as 12 gallons of gasoline and set it afire after the deputies were in the house. Defendant told his wife, his son, and his friend he would light things on fire.

Accordingly, had an instruction similar to CALJIC No. 8.66.1 actually been given, the jury's task would have been easier. The jury struggled with the issue of intent, as evidenced by its question to the court during deliberations:

"We . . . want clarification on what constitutes 'specific intent' in relation to the attempted murder charges. (Or tell us exactly where it appears in the instructions given[.])"

The trial court apparently responded that specific intent ". . . refers to the purpose, aim or goal of the person in committing the act." Had the jury been given an instruction explaining "concurrent intent" and "kill zone," it appears likely the jury would have reached the same verdict.

II

We note a sentencing error requiring correction. The trial court imposed a one-year enhancement for being armed with a deadly weapon on count one and a consecutive one-year enhancement for being armed with a deadly weapon on count two. (Pen. Code, § 12022, subd. (b)(1).) Under Penal Code section 1170.1, the trial court is required to impose one-third of each consecutive enhancement, absent circumstances not applicable to this case. (§ 1170.1, subd. (a).) Because the issue is solely one of law, and in the interest of judicial economy, we shall order the error corrected. Any aggrieved party may petition for rehearing. (Gov. Code, § 68081.)

DISPOSITION

The judgment is affirmed, as modified. The enhancement for use of a weapon on count two (§ 12022, subd. (b)(1)) shall be four months. The trial court shall prepare a modified abstract of judgment reflecting this change and forward a certified copy of said abstract to the Department of Corrections.

RAYE, J.

We concur:

BLEASE, Acting P.J.

NICHOLSON, J.